MOTION FILED
OCT 27 2003

(5)

No. 03-468

IN THE
Supreme Court of the United States

ROY S. MOORE, in his official capacity as Chief Justice of the Alabama Supreme Court,
Petitioner,

v.

STEPHEN GLASSROTH,

Respondent.

ROY S. MOORE, in his official capacity as administrative head of the Alabama Judicial System,
Petitioner,

v.

MELINDA MADDOX and BEVERLY J. HOWARD,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF CORAL RIDGE MINISTRIES, FOCUS ON THE FAMILY, AND FAMILY RESEARCH COUNCIL IN SUPPORT OF PETITIONER

J. MICHAEL JOHNSON
ALLIANCE DEFENSE FUND
American Tower, Suite 900
401 Market Street
Shreveport, LA 71101
(318) 459-2239

JORDAN W. LORENCE
Counsel of Record
PETER A. GENTALA
DALE M. SCHOWENGERDT
ALLIANCE DEFENSE FUND
15333 N. Pima Road
Suite 165
Scottsdale, AZ 85260
(480) 444-0020

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

31 pp

IN THE

Supreme Court of the United States

No. 03-468

ROY S. MOORE, in his official capacity as Chief Justice of the Alabama Supreme Court,
Petitioner,

v.

STEPHEN R. GLASSROTH,
Respondent.

ROY S. MOORE, in his official capacity as administrative head of the Alabama Judicial System,
Petitioner,

v.

MELINDA MADDOX and BEVERLY J. HOWARD,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Now come Coral Ridge Ministries, Focus on the Family, and Family Research Council (collectively "*Amici*") and seek leave to file this brief *Amici Curiae*. As grounds therefore, *Amici* would show that:

1. Pursuant to Supreme Court Rule 37(2)(b), counsel for *Amici* wrote to counsel for all parties in this action

requesting written consent to file this brief, which letters are made part of this motion;

2. Petitioner Alabama Supreme Court Chief Justice Roy S. Moore has granted permission for *Amici* to file this brief, whose letter is made a part of this motion;

3. Counsel for Respondents Maddox and Howard have withheld their written consent for *Amici* to file this brief and communicated their denial through an e-mail stating in part: "In light of our having waived the filing of a response to Moore's cert petition, we are not consenting to the filing of amicus briefs in support of the petition." This e-mail is made part of this motion;

4. Counsel for Respondent Glassroth also withheld written consent for *Amici*, communicating denial through a phone conversation.

Amici are non-profit organizations that appreciate the significant role religion plays in American life and the Constitution's protections of religious freedom. *Amici* write to urge this honorable Court to affirm that role and those protections by recognizing the government's ability to acknowledge and accommodate religion through monuments such as the one in Alabama.

Amici submit that this case raises such crucial issues regarding religion's role in society that Respondents' decision to waive response to the petition should not foreclose participation by interested *Amici*. *Amici* respectfully request leave to file this brief.

Jordan W. Lorence
Counsel of Record for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

INTEREST OF AMICI 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. THIS COURT SHOULD ADDRESS THE CONSTITUTIONAL PRINCIPLES FOR RELIGIOUS MONUMENTS 3

II. THIS COURT SHOULD ABANDON THE *LEMON* TEST 5

A. *Lemon* Provides Inadequate Guidance For The Lower Courts 7

B. *Lemon* Leads To Disparate Results 7

1. Purpose Prong 8

2. Effects Prong 9

C. *Lemon* Is Inconsistent With The Establishment Clause's Original Meaning 10

III. THIS COURT SHOULD REPLACE THE *LEMON* TEST WITH A FORMAL COERCION TEST 15

IV. THE ELEVENTH CIRCUIT IGNORED THIS COURT'S REQUIREMENT OF ARTICLE III STANDING FOR ESTABLISHMENT CLAUSE CHALLENGES 16

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Abington Township v. Schemmp,
374 U.S. 203 (1963).....17

ACLU v. Capitol Square Review Advisory Bd,
243 F.3d 289 (6th Cir. 2001).....11, 13

ACLU of Kentucky v. McCreary County,
No. 01-5935 (6th Cir. filed July 26, 2001).....5

ACLU of Kentucky v. Mercer County,
No. 03-5142 (6th Cir. filed February 3, 2003).....5

ACLU of Nebraska v. City of Plattsmouth,
186 F.Supp.2d 1024 (D.Neb. 2002).....5

ACLU of New Jersey v. Schundler,
104 F.3d 1435 (3d Cir. 1997).....4

ACLU of Ohio v. Ashbrook,
No. 02-3667 (6th Cir. filed June 17, 2002).....5

Anderson v. Salt Lake City Corp.,
475 F.2d 29 (10th Cir. 1975).....5

Baker v. Adams County,
No. 02-3777 (6th Cir. filed July 11, 2002).....5

Barnes v. Cavazos,
966 F.2d 1056 (6th Cir. 1992).....7

Brown Shoe Co. v. U.S.,
370 U.S. 294 (1962).....16

Capitol Square Review & Advisory Board v. Pinette,
515 U.S. 753 (1995).....9

City of Edmond v. Robinson,
517 U.S. 1201 (1996).....17

City of Zion v. City of Rolling Meadows,
927 F.2d 1401 (7th Cir. 1991).....7

Colorado v. Freedom from Religion Found.,
898 P.2d 1013 (Colo. 1995).....5

Committee for Public Educ. and Religious Liberty v. Regan,
444 U.S. 646 (1980).....6

Everson v. Bd. of Educ. of Ewing Township,
330 U.S. 1, 16 (1947).....13, 14

FEC v. NRA Political Victory Fund,
513 U.S. 88 (1996).....16

Freethought Soc'y of Greater Philadelphia v. Chester County, 334 F.3d 247 (3d Cir. 2003).....5, 10

Freethought Soc'y v. Chester County,
191 F.Supp.2d 589 (E.D. Pa. 2002).....10

Glassroth v. Moore,
229 F.Supp.2d 1290 (M.D. Ala. 2002).....1, 8, 9, 10, 14

Glassroth v. Moore,
335 F.3d 1282 (11th Cir. 2003).....1, 7, 8, 16, 18

Grayned v. City of Rockford,
408 U.S. 104 (1972).....8

King v. Richmond County,
331 F.3d 1271 (11th Cir. 2003).....4, 5

Lee v. Weisman,
505 U.S. 577 (1992).....3, 6, 15, 17

Lemon v. Kurtzman,
403 U.S. 602 (1971).....5, 7

Lewis v. Continental Bank Corp.,
494 U.S. 472 (1990).....16

Lynch v. Donnelly,
465 U.S. 668 (1984).....6, 8

Marsh v. Chambers,
463 U.S. 783 (1983).....6, 15

McCollum v. Bd. of Educ.,
333 U.S. 203.....14

Modrovich v. County of Allegheny,
No. 03-3571 (3rd Cir. filed August 28, 2003) 4

Murray v. City of Austin, Texas,
947 F.2d 147 (5th Cir. 1991).....10

Rosenberger v. Rector and Visitors of the Univ. of Virginia,
515 U.S. 819 (1995).....6

Rusk v. Crestview Local Schs.,
220 F.Supp.2d 854 (N.D. Ohio 2002).....7

Stone v. Graham,
449 U.S. 39 (1980).....4

Tangipahoa Parish Bd. of Educ. v. Freiler,
530 U.S. 1251 (2000).....6

U.S. v. L.A. Trucker Truck Lines,
344 U.S. 33 (1952).....16

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,
454 U.S. 464 (1982)..... 3, 16-18

Van Orden v. Perry,
No. 02-51184 (5th Cir. filed October 31, 2002).....4

Wallace v. Jaffree,
472 U.S. 38.....8

Warth v. Seldin,
422 U.S. 490 (1975).....16

West Virginia Bd. of Educ. v. Barnette,
319 U.S. 624 (1943).....15

Widmar v. Vincent,
454 U.S. 263 (1981).....15

Zelman v. Simmons-Harris,
536 U.S. 639 (2002).....6, 16

Zorach v. Clauson,
343 U.S. 306 (1952).....6

OTHER AUTHORITIES

Akhil Reed Amar, *The Bill of Rights* 32 (1998).....10

George Washington, *Farewell Address*, 4 Annals of Cong. 2876 (1796) 12

Joseph Story, *Commentaries on the Constitution of the United States*, § 1868 (1833) 11

Philip Hamburger, *Separation of Church and State* (2002) 13, 14

Stephen L. Carter, *The Culture of Disbelief* (1993) 12

The Definitive Treaty of Peace of 1783, 26 Journals of the Continental Congress 23 13

The Gadsen Purchase Treaty, December 30, 1853, 10 Stat. 1031 13

The Gallup Organization, *Americans Approve of Public Displays of Religious Symbols* (October 3, 2003) 4

Ronald D. Rotunda & John E. Nowak, *Introduction to Joseph Story, Commentaries on the Constitution of the United States* (reprinted 1987) 11

United States Treaty with Morocco Upholding the Light-House at Cape Spartel, May 31, 1865, 14 Sta. 679 13

CONSTITUTIONAL PROVISIONS

U.S. Const. art. III, § 1 16

LAW REVIEWS

Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools-An Update*, 75 Cal. L. Rev. 5 (1987) 5

Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933 (1986).....15

Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105 (2003) 11, 12

Thomas A. Schweitzer, *Lee v. Weisman and the Establishment Clause: Are Invocations and Benedictions at Public School Graduations Constitutionally Unspeakable?*, 69 U. Det. Mercy L. Rev. 113 (1992).....10

ORGANIC LAWS OF THE UNITED STATES

The Declaration of Independence (U.S. 1776).....14

INTEREST OF AMICI[1]

Coral Ridge Ministries ("Coral Ridge") is a non-profit organization that exists to inform, equip, and support Christians; enabling them to defend and implement the Biblical principles on which our country was founded. Coral Ridge was established by Dr. D. James Kennedy to provide non-partisan, non-denominational information, training, and support to all those interested in positively affecting the culture and renewing the vision of our Founding Fathers as expressed in America's founding documents. Coral Ridge is a national grassroots organization with participants in all fifty states.

Coral Ridge supports Alabama Chief Justice Roy S. Moore, and his efforts to acknowledge the important role the Ten Commandments play in this country's legal system. The Eleventh Circuit specifically noted the supportive role Coral Ridge played for the Chief Justice in this litigation. *Glassroth v. Moore*, 335 F.3d 1282, 1286 (11th Cir. 2003) (hereinafter, "*Glassroth II*"). The district court, too, found Coral Ridge's involvement extremely significant and mentioned the ministry prominently throughout its decision. *Glassroth v. Moore*, 229 F.Supp.2d 1290, 1294, 1303, 1304 n.2, 1316-17 (M.D. Ala. 2002) (hereinafter, "*Glassroth I*").

Focus on the Family ("Focus") is a nonprofit organization founded by James C. Dobson, PhD an internationally recognized expert on the family. Dr. Dobson is well known through his syndicated radio programs heard daily on more than three thousand radio stations in twelve languages in

---

[1] No portion of this brief was authored by counsel for a party and no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

more than ninety-five countries. Focus is dedicated to strengthening the family as one of the foundational institutions of civilization.

Family Research Council ("FRC") is a nonprofit research and educational corporation headquartered in Washington D.C. FRC exists to affirm and promote the traditional family and the Judeo-Christian principles upon which this country is built. FRC provides resources and guidance for citizens concerned about national policy as it relates to cultural morality.

Amici believe that the government may lawfully acknowledge the major role religious principles have served in forming our legal system and liberties. Specifically, the Ten Commandments monument displayed by Alabama Supreme Court Chief Justice Roy S. Moore exemplifies lawful acknowledgment. *Amici* believe that banning such displays affirmatively denies the historical facts of our religious heritage as a nation.

SUMMARY OF THE ARGUMENT

This Court should address the constitutional principles for government displays of monuments with religious messages. In addition to the present case, there are no fewer than fifteen Ten Commandments monument cases pending before the federal courts. *See* Appendix A (listing active federal Ten Commandments cases). The issues presented in these cases go to the heart of whether government may acknowledge God's role in human affairs—just as the Framers clearly did—with passive monuments or displays.

The decision below illustrates why the *Lemon* test is unworkable and should be discarded. *Lemon* has led courts to delve into detailed inquiries about the personal beliefs of government officials, as did the court below. Such a result creates a new form of religious test. In order to survive constitutional scrutiny, religious monuments must either be

"grandfathered in," by virtue of their age, or found to be completely lacking any religious significance. Such a result is inconsistent with the history of the First Amendment.

This Court should abandon the *Lemon* test in favor of the formal coercion test endorsed by four members of this Court in *Lee v. Weisman,* 505 U.S. 577, 640 (1992). The Establishment Clause, viewed through lens of our nation's history and tradition, is a protection against coerced belief or action and the establishment of a national church. It was not intended to prohibit the government's ability to acknowledge God and the importance of religion to the founding of our country. This Court should resolve the continuing conflict and confusion surrounding the Establishment Clause by giving clear guidance to lower courts deciding cases involving religious displays in a way consistent with the history and purpose of the Establishment Clause.

This Court also should address the lack of Article III standing of most plaintiffs who challenge the constitutionality of religious monuments. Typically, the plaintiffs in these cases lack any concrete injury. For example, the court below allowed mere emotional reactions, combined with self-inflicted and pretextual economic burdens, to confer standing on Plaintiffs. In so doing, the court below disregarded this Court's clear holding in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

ARGUMENT

I. THIS COURT SHOULD ADDRESS THE CONSTITUTIONAL PRINCIPLES FOR RELIGIOUS MONUMENTS

The law surrounding governmental display of the Ten Commandments is far from settled and this Court should address it. No fewer than fifteen cases regarding the issue

are pending in federal courts. *See* Appendix A (listing active federal Ten Commandments cases). Clearly, litigation over these displays involves important issues pertinent to Americans today, and vital to the national identity.[2] As the Third Circuit Court of Appeals has observed: "The uncertain contours of these Establishment Clause restrictions virtually guarantee that on a yearly basis, municipalities, religious groups, and citizens will find themselves embroiled in legal and political disputes over the content of municipal displays." *ACLU of New Jersey v. Schundler*, 104 F.3d 1435, 1437 (3d Cir. 1997).

This Court has granted certiorari to a Ten Commandments dispute only once, and then only within the fact-specific context of Kentucky's public schools. *Stone v. Graham*, 449 U.S. 39 (1980). Since May of this year alone, three federal appellate courts have published opinions in Ten Commandments display cases.[3] Meanwhile, seven Ten Commandments cases are pending before the Third,[4] Fifth,[5]

---

[2] As of September 2003, 77% of Americans favored public display of the Ten Commandments. *See* The Gallup Organization, *Americans Approve of Public Displays of Religious Symbols* (October 3, 2003), *at* http://www.gallup.com/poll/releases/pr031003.asp ("Seven in 10 Americans approve of the display of a Ten Commandments monument in a public area, an attitude at odds with a federal judge's recent order to remove such a monument from an Alabama courthouse.").

[3] The other two are *King v. Richmond County*, 331 F.3d 1271 (11th Cir. 2003), *reh'g denied*, No. 02-14146 (11th Cir. August 6, 2003) and *Freethought Soc'y of Greater Philadelphia v. Chester County*, 334 F.3d 247 (3d Cir. 2003), *reh'g denied*, No. 02-1765 (3d Cir. August 11, 2003).

[4] *Modrovich v. County of Allegheny*, No. 03-3571 (3rd Cir. filed August 28, 2003).

[5] *Van Orden v. Perry*, No. 02-51184 (5th Cir. filed October 31, 2002).

Sixth,[6] and Eighth[7] circuits.

Finally, the Third Circuit,[8] the Tenth Circuit,[9] the Eleventh Circuit,[10] and the Colorado Supreme Court[11] have all upheld various forms of Ten Commandments displays as consistent with the Establishment Clause. The panel decision in *Glassroth II* conflicts with these decisions. Without this Court's guidance, future decisions will only perpetuate the existing confusion.

II. THIS COURT SHOULD ABANDON THE *LEMON* TEST

Seldom has a decision by this Court been so criticized as *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See, e.g.*, Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools-An Update*, 75 Cal. L. Rev. 5, 6 (1987) ("It is fair to say that subsequent decisions [since *Lemon*] have produced a conceptual disaster area."). Although a majority of the

---

[6] There are four cases pending before the Sixth Circuit alone. *ACLU of Kentucky v. McCreary County*, No. 01-5935 (6th Cir. filed July 26, 2001); *ACLU of Ohio v. Ashbrook*, No. 02-3667 (6th Cir. filed June 17, 2002); *Baker v. Adams County*, No. 02-3777 (6th Cir. filed July 11, 2002); *ACLU of Kentucky v. Mercer County*, No. 03-5142 (6th Cir. filed February 3, 2003).

[7] *ACLU of Nebraska v. City of Plattsmouth*, 186 F.Supp.2d 1024 (D.Neb. 2002).

[8] *Freethought Soc'y*, 334 F.3d at 247 (upholding constitutionality of Ten Commandments plaque on county courthouse).

[9] *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1975), *cert. denied* 414 U.S. 879 (1973) (upholding constitutionality of illuminated display of Ten Commandments on courthouse grounds).

[10] *King*, 331 F.3d at 1271 (Affirming constitutionality of city clerk's seal containing Ten Commandments).

[11] *Colorado v. Freedom from Religion Found.*, 898 P.2d 1013 (Colo. 1995), *cert. denied*, 516 U.S. 1111 (1996) (upholding constitutionality of Ten Commandments display on state property).

members of this Court have expressed disdain for the test, *Lemon* remains alive and well. *See, e.g., Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 2708 (2000) (citing instances in which Scalia, J., Thomas, J., Kennedy, J., O'Connor, J., and Rehnquist, C.J. expressed disapproval of *Lemon*).

This Court has declined to apply or even mention *Lemon* in several important Establishment Clause cases. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Lee v. Weisman*, 505 U.S. 577; *Marsh v. Chambers*, 463 U.S. 783 (1983). Other tests have emerged, but none has conclusively supplanted *Lemon*.[12]

Unfortunately, the decision to sacrifice "clarity and predictability for flexibility," *Committee for Public Educ. and Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980), has had the effect of also sacrificing individual religious rights and the government's ability to recognize the important role of religion, its tenets and teachings, and its basis for law and civil order in our society. Simply put, the *Lemon* test is at odds with Justice Douglas's famous observation in *Zorach v. Clauson*, 343 U.S. 306, 313-314 (1952): "We are a religious people whose institutions presuppose a Supreme Being."

---

[12] This Court has varied its Establishment Clause jurisprudence by introducing the "endorsement test," *Lynch v. Donnelly*, 465 U.S. 668 (1984), the "psychological coercion test," *Lee v. Weisman*, 505 U.S. 577 (1992), the "neutrality test," *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995), and the "historical test," *Marsh v. Chanbers*, 463 U.S. 783 (1983).

A. *Lemon* Provides Inadequate Guidance For The Lower Courts

The *Lemon* test has been so disparaged by members of this Court that lower courts routinely cite criticism of the test before applying it. *See, e.g., Glassroth II*, 335 F.3d at 1295 (making the "obligatory observation that the *Lemon* test is often maligned"). Several circuits have pled for a more precise and predictable test for deciding Establishment Clause cases. *See, e.g., Barnes v. Cavazos,* 966 F.2d 1056, 1063 (6th Cir. 1992) ("The *Lemon* test has received criticism from virtually every corner and we add our voices to those who profess confusion and frustration with *Lemon's* analytical framework."); *City of Zion v. City of Rolling Meadows,* 927 F.2d 1401, 1419 (7th Cir. 1991) ("Applying *Lemon* . . . to religious symbols on city seals is no cakewalk. *Lemon's* 'three-part test' is not a test. It is a triad of questions, the answers to which conflict in all interesting cases."); *Rusk v. Crestview Local Schs.,* 220 F.Supp.2d 854, 856-57 (N.D. Ohio 2002) ("The *Lemon* test has attracted criticism due to the lack of explicit language and confusion in applying it to specific scenarios.").

B. *Lemon* Leads To Disparate Results

Application of *Lemon's* three part inquiry ("secular legislative purpose"; "primary effect" that "neither advances nor inhibits religion"; and absence of "excessive government entanglement with religion" 403 U.S. at 612-613)[13] has proven entirely problematic, particularly in the religious display context. In recent years alone, a number of lower courts have utilized different approaches to *Lemon's* purpose

---

[13] Neither court below ruled on the basis of *Lemon's* excessive entanglement prong.

and effect prongs, leading to inconsistent results. These disparate approaches do not create a clear understanding of the requirements of the First Amendment. On the contrary, "they inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (quoting *Bagett v. Bullitt,* 377 U.S. 360, 372 (1964)). The nation's religious observance should not be chilled by an unsure jurisprudence.

1. Purpose Prong

Application of the secular purpose prong among the circuits has yielded varying results. Chief Justice Rehnquist has criticized the secular purpose prong as "mercurial in application because it has never been fully defined, and we have never fully stated how the test is to operate. . . ." *Wallace v. Jaffree*, 472 U.S. 38, 108 (1985) (Rehnquist, C.J., dissenting).

This Court has stated that "a secular purpose" will satisfy *Lemon's* purpose prong even if there is a religious aspect to the government action at issue. *Lynch*, 465 U.S. at 681 n.6 ("The City contends that the purposes of the display are 'exclusively secular.' We hold only that Pawtucket has a secular purpose for its display, which is all that *Lemon* requires.").

The Eleventh Circuit in *Glassroth II* inverted the purpose test. In an approach summarily affirmed by the Eleventh Circuit, the district court below treated **any** religious purpose as a *per se* violation of the *Lemon* test. Although there was strong evidence of a secular purpose in the record,[14] the

---

[14] *See Glassroth I*, 229 F.Supp.2d at 1300 ("Experts on both sides testified that the Ten Commandments were a foundation of American law, that America's

Footnotes continued to next page.

district court found that a secular purpose was lacking because Chief Justice Moore actually believes in the importance of the Ten Commandments. *Glassroth I*, 229 F.Supp.2d at 1296. In essence, the Eleventh Circuit ruled that the Chief Justice's beliefs invalidate the legitimate secular purpose for the monument because he sees the monument as more than a "sort of secular moral code." *Id.*

The Eleventh Circuit applies the "secular purpose prong" of *Lemon* as a new form of religious test. When a governmental official actually believes that individual rights ultimately derive from God—as the Declaration of Independence clearly states—then any act of religious symbolism acknowledging that fact will violate the Establishment Clause, even if legitimate secular reasons for the display clearly exist. Such parsing of motive and purpose flies in the face of our Nation's history and tradition, and should not be sanctioned in the name of the First Amendment.

2. Effects Prong

The effects prong of *Lemon* is so malleable that lower courts have conflated the effects analysis with the "endorsement test." Both tests inquire as to what a reasonable observer would perceive as government endorsement of religion. *See generally*, *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995) (Justices O'Connor and Stevens detail different versions of the reasonable observer under the endorsement test). Scholars have criticized the second prong of *Lemon* as vague, nebulous, subjective, and almost impossible to apply.

---

founders looked to and relied on the Ten Commandments as a source of absolute moral standards.").

See Thomas A. Schweitzer, *Lee v. Weisman and the Establishment Clause: Are Invocations and Benedictions at Public School Graduations Constitutionally Unspeakable?*, 69 U. Det. Mercy L. Rev. 113, 163 (1992).

The unpredictability in the Circuits from *Lemon's* "effects" prong is well illustrated by comparing the present case to the Third Circuit's *Freethought Society* decision. The court below upheld findings that nothing in the history or physical characteristics of the monument would mitigate the impression of a reasonable observer that the State of Alabama was endorsing Christianity. *Glassroth I*, 229 F.Supp.2d at 1304. In contrast, the appellate court in *Freethought Society* upheld a Ten Commandments monument, 334 F.3d at 266-67, even though the district court found it to be large, prominent, and unique, *Freethought Soc'y v. Chester County*, 191 F.Supp.2d 589, 598 (E.D. Pa. 2002), *rev'd Freethought Soc'y*, 334 F.3d 247.

Simply put, the effects prong gives courts no clear guidance. As the Fifth Circuit noted, "[i]f we focus exclusively on the inclusion of the religious symbol, display, or practice, then every use of religious symbolism—and prayer—would fail [the effects prong of *Lemon*]." *Murray v. City of Austin, Texas*, 947 F.2d 147, 154 (5th Cir. 1991). As a result, courts have license to either allow everything or proscribe everything as having the primary effect of advancing or endorsing religion. Such a result contributes to a lack of coherent Establishment Clause jurisprudence.

C. *Lemon* Is Inconsistent With The Establishment Clause's Original Meaning

The inconsistent results produced by *Lemon* are squarely at odds with the true meaning of the Establishment Clause. By design, the Establishment Clause prevented the newly formed federal government from establishing religion at the federal level. *See* Akhil Reed Amar, *The Bill of Rights* 32

(1998); Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2109 (2003).

As Joseph Story, a man with unique insight into the meaning and purpose of the First Amendment,[15] explained:

> Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration, the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

Joseph Story, *Commentaries on the Constitution of the United States*, § 1868 (1833), *reprinted in* 5 *The Founders' Constitution* 108 (Philip B. Kurland & Ralph Lerner eds. 1987).

"If our history demonstrates anything, it demonstrates that the people of the United States did not adopt the Bill of Rights in order to strip the public square of every last shred of public piety." *ACLU v. Capitol Square Review and Advisory Bd.*, 243 F.3d 289, 300 (6th Cir. 2001) (internal

---

[15] Joseph Story (1779-1845) was a lawyer, statesman, and jurist who served as a Justice of the United States Supreme Court for thirty-four years. In 1829, he became the first Dane Professor of Law at Harvard University. His *Commentaries on the Constitution of the United States* was one of the most influential legal works of its time, becoming required reading for law students shortly after its publication. *See* Ronald D. Rotunda & John E. Nowak, *Introduction to Joseph Story, Commentaries on the Constitution of the United States*, at v-xiii (reprinted 1987).

quotes omitted). It is ironic that the current Establishment Clause jurisprudence focuses so relentlessly on the secular purpose for government actions concerning religion. Writings of the founding generation unequivocally commend a robust spirituality among the citizenry. For instance, George Washington chose the occasion of his farewell to public life to address the importance of religion to American society:

> Of all the dispositions and habits which lead to political prosperity, Religion and Morality are indispensable supports. . . . Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

George Washington, *Farewell Address*, *in* 4 *Annals of Cong.* 2876 (1796). John Witherspoon, who taught James Madison at Princeton, advised that "to promote religion is the best and most effectual way of making a virtuous and regular people." McConnell, 44 Wm. & Mary L. Rev. at 2196-97 (citing John Witherspoon, *Lectures on Moral Philosophy* 110 (Varnum Collins ed., 1912). Much more recently, Franklin D. Roosevelt observed that the American people "hold to the inspiration of the Old Testament and accept the Ten Commandments as the fundamental law of God." *Quoted in* Stephen L. Carter, *The Culture of Disbelief* 100 (1993). Dwight D. Eishower recognized "[w]ithout God there could be no American form of government, nor an American way of life." *Id.* Likewise, the United States has entered into several international treaties, which invoke the favor of

divine providence.[16]

The push for a revision of the Establishment Clause to a strict separation of church and state is a new phenomenon. At the end of the nineteenth century, proponents of a strict separation—like representative James G. Blaine of Maine—sought to amend the Constitution because they knew that the First Amendment did not "fully guarantee the separation of church and state" they desired. *See* Philip Hamburger, *Separation of Church and State* 296 (2002). The effort to amend the religion clauses reached its zenith in 1875 when President Ulysses S. Grant urged the House and Senate to adopt a constitutional amendment creating a separation of church and state. *Id.* at 322. When the attempts to amend the Constitution failed, proponents of a strict separation focused their attentions on recasting the First Amendment in a new interpretive light. *Id.* at 335-359.

The modern conception of a separation of church and state conflicts with the original understanding of the Establishment Clause. "The notion that the First Amendment was designed to impose a secular political culture on the nation would have struck most 19th Century judges as absurd." *Capitol Square Review*, 243 F.3d at 298. Nonetheless, in 1947 this Court embraced the notion that the Establishment Clause "was intended to erect 'a wall of separation between Church and State.'" *Everson v. Bd. of*

---

[16] *See, e.g., The Definitive Treaty of Peace of 1783, in* 26 Journals of the Continental Congress 23 (Worthington C. Ford et al. eds., 1904-37) (beginning "In the name of the most holy and undivided trinity.") (the treaty was signed by John Jay, John Adams, and Benjamin Franklin); *United States Treaty with Morocco Upholding the Light-House at Cape Spartel, May 31, 1865*, 14 *Stat.* 679 ("In the name of the only God! There is no strength nor power but of God."); and *The Gadsen Purchase Treaty, December 30, 1853*, 10 *Stat.* 1031 ("IN THE NAME OF ALMIGHTY GOD").

Educ. of Ewing Township, 330 U.S. 1, 16 (1947). The Establishment Clause was in place for over one-hundred and fifty years before this Court used it to invalidate government action.[17]

As a doctrine, strict separation was urged upon this Court by several radical voices. Archetypical of these is the position taken by the American Civil Liberties Union before this Court: "The purpose of the First Amendment, seen in the perspective of history, is clear enough. It was designed to bring about the complete separation of church and state." Amicus Brief of ACLU in *Everson v. Bd. of Educ.*, *quoted in* Hamburger, *supra* at 458. Such a position as asserted by the ACLU has no basis in fact or history and should be rejected by this Court.

Indeed, the strict separationist approach results in an absurd repudiation of America's heritage. For example, the very document that birthed the United States proffers unmistakably religious justifications for the creation of the American identity: It speaks of the "Laws of Nature and of Nature's God"; asserts the truth that "all men are created equal," and are "endowed by their Creator with certain unalienable Rights"; and "appeals to the Supreme Judge of the world." The Declaration of Independence paras. 1-2, 36 (U.S. 1776). Contrast this candid recognition of God with the conclusion of the district court below: "*the state* may not acknowledge the sovereignty of the Judeo-Christian God and attribute to that God our religious freedom." *Glassroth I*, 229 F.Supp.2d at 1312. One must conclude that the *Lemon* test is flawed when it would invalidate the very words of the Declaration of Independence.

---

[17] *See McCollum v. Bd. of Educ.*, 333 U.S. 203, 205 (1948).

III. THIS COURT SHOULD REPLACE THE *LEMON* TEST WITH A FORMAL COERCION TEST

This Court should abandon the *Lemon* test and realign Establishment Clause jurisprudence to conform more closely to the intent of the Framers of the First Amendment. Specifically, this Court should adopt the formal coercion test discussed by Justice Scalia in *Lee v. Weisman,* 505 U.S. at 631 (Scalia, J., dissenting).

Justice Scalia, speaking for four members of this Court, stated: "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Id.* at 640 (emphasis in the original). *See also* Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933 (1986).

The formal coercion test should be used to scrutinize government actions acknowledging religion. The test should also be applied in a way consistent with historic precedents demonstrating that the Framers of the First Amendment found a certain activity consistent with the Establishment Clause. This Court used that approach when it upheld the practice of paid chaplains praying before the Nebraska Legislature in *Marsh v. Chambers*, 463 U.S. 783, based on the practice of the First Congress which also employed paid chaplains.

The formal coercion test would dovetail with other constitutional provisions protecting an individual's right of conscience to opt out of participation in such events. *See, e.g., West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that students with a conscientious objection to saying the Pledge of Allegiance must be excused from a state law requirement to recite it in public school). Additionally, the formal coercion test would not supplant the neutrality principle expressed in *Widmar v. Vincent*, 454

U.S. 263 (1981) and *Zelman*, 536 U.S. 639 as applied to access by religious groups to government services and funding. *Amici* urge this Court to adopt the formal coercion test to replace the *Lemon* test for deciding Establishment Clause cases.

IV. THE ELEVENTH CIRCUIT IGNORED THIS COURT'S REQUIREMENT OF ARTICLE III STANDING FOR ESTABLISHMENT CLAUSE CHALLENGES

Additionally, the Eleventh Circuit ignored this Court's clear ruling that parties must show actual injury in order to bring an Establishment Clause challenge. *See Valley Forge*, 454 U.S. 464. The jurisdiction of the federal courts is limited to "cases" and "controversies." U.S. Const. art. III, § 1. Among other things, this limitation means that "[t]hose who do not possess Art. III standing may not litigate as suitors in the courts of the United States." *Valley Forge*, 454 U.S. at 476.[18]

The Eleventh Circuit concluded that the Plaintiffs in this litigation—three practicing attorneys—had standing because they were offended by the monument, felt like outsiders, and because some of the Plaintiffs altered their behavior as a result of these feelings. *Glassroth II*, 335 F.3d at 1288, 1292. This finding falls far short of the requirement that a

---

[18] Because it deals with the power of federal courts to hear disputes, standing is a threshold issue in every federal case. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The standing requirement "subsists through all stages of federal judicial proceedings, trial and appellate." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). This Court is not bound by its prior decisions where jurisdiction was exercised but not discussed. *U.S. v. L.A. Trucker Truck Lines*, 344 U.S. 33, 38 (1952); *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 307 (1962); *and FEC v. NRA Political Victory Fund*, 513 U.S. 88, 97 (1996).

plaintiff must be injured in fact to have standing before the federal courts.[19]

In *Valley Forge* this Court rejected non-economic injury Establishment Clause claims, calling them "unusually broad and novel." 454 U.S. at 470. These claimants lacked standing because:

> They fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms.

Id. at 485-486 (emphasis in original).

While there are "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools," *Lee v. Weisman*, 505 U.S. 577, 592 (1992), the Plaintiffs in this case were never subjected to such pressures. They are not impressionable children; they are adult attorneys. Nor were the Plaintiffs in this case subjected to mandatory religious practices such as scriptural readings and recitation of the Lord's Prayer. *See Abington Township v. Schemmp*, 374 U.S. 203, 223 (1963). They merely encountered a stationary monument in the hall of a public building. If the monument had a nonreligious message, the Plaintiffs could not have convinced a court to censor it.

---

[19] Three members of this Court have disagreed with a finding of non-economic injury in an Establishment Clause challenge to a religious symbol on public property. *See City of Edmond v. Robinson*, 517 U.S. 1201 (1996) (Rehnquist, C.J., joined by Scalia, J., and Thomas, J., dissenting from denial of certiorari).

It is insignificant that some of the Plaintiffs in this action voluntarily chose to alter their behavior because of their personal distaste for the monument. *Glassroth II*, 335 F.3d at 1292. Mere psychological injury—utterly ineffective to give standing—cannot become injury when plaintiffs choose to detour around a passive display. There was no basis for the Eleventh Circuit to ignore the rule of *Valley Forge*.

Article III standing is not available to all would-be plaintiffs. "[T]he judicial power requires . . . more for its invocation than important issues and able litigants." *Valley Forge*, 454 U.S. at 489-490. To satisfy Article III, the plaintiffs in this action must prove injury in fact. They cannot do this because they were not injured by the Chief Justice's acknowledgment of God and invocation of historical documents and events; they were simply offended by it. The Establishment Clause does not equip offended observers with blanket vetoes to government action.

CONCLUSION

Amici respectfully request that this Court grant a Writ of Certiorari to: (1) guide the lower courts to decide religious display cases in a manner consistent with the purpose of the Establishment Clause; (2) replace the *Lemon* test with the formal coercion test; and (3) affirm that non-economic injury is insufficient to confer Article III standing.

Respectfully submitted,

JORDAN W. LORENCE*
PETER A. GENTALA
DALE M. SCHOWENGERDT
ALLIANCE DEFENSE FUND
15333 N. Pima Rd., Ste.165
Scottsdale, Arizona 85260
(480) 444-0020

J. MICHAEL JOHNSON
ALLIANCE DEFENSE FUND
American Tower, Suite 900
401 Market Street
Shreveport, Louisiana 71101
(318) 459-2239

*COUNSEL OF RECORD

October 23, 2003